No. 83-687

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CLIFFORD B. ERNST, JR. - - - Petitioner

versus

INDIANA BELL TELEPHONE, CO., INC.
and COMMUNICATIONS WORKERS
OF AMERICA, LOCAL 5703 - - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND APPENDIX

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QUESTIONS PRESENTED

1. Should the holding of the United States Supreme Court in *Delcostello* v. *International Brotherhood of Teamsters* be given retroactive application to defeat Petitioner's Cause of Action?

2. Is there an implied private right of action under section 503(a) of the Rehabilitation Act, 29 U.S.C. §793 (a)?

3. Were there genuine issues of fact presented by the Petitioner to preclude the grant of Summary Judgment?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

CLIFFORD B. ERNST, JR. - - - *Petitioner*

v.

INDIANA BELL TELEPHONE, CO., INC. and COMMUNICATIONS WORKERS OF AMERICA, LOCAL 5703 - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Clifford B. Ernst, Jr., respectfully prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 28, 1983.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit was rendered on July 28, 1983, and is to be published.

The Judgment of the United States District Court for the Southern District of Indiana, New Albany Division, was entered on December 30, 1982.

JURISDICTION

The as yet to be published Opinion of the United States Court of Appeals for the Seventh Circuit affirming the Judgment of the United States District Court for the Southern District of Indiana, New Albany Division, granting a Summary Judgment in favor of the Respondents was rendered and entered on July 28, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

Section 301 of the Labor Management and Relations Act, 29 U.S.C. §185(a)(1947).

Section 503(a) of the Rehabilitation Act, 29 U.S.C. §793(a)(b) (1978).

Indiana Code §34-1-2-2(1981)

Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b)(1947).

STATEMENT OF THE CASE

The Petitioner, Clifford B. Ernst, Jr., from June 28, 1965 until April 27, 1980, was employed as an installation repair technician by Respondent, Indiana Bell Telephone Company, Inc. (hereinafter referred to as Indiana Bell). Petitioner was terminated from his employment on April 27, 1980 after having exhausted his sickness disability benefits which he was receiving due to a serious injury suffered by him during a motor vehicle accident on April 21, 1979. The accident occurred at approximately 12:30 A.M. while

Petitioner, driving an Indiana Bell truck, was returning to the Indiana Bell compound from a job he had been ordered to perform by the Respondent, Indiana Bell. Petitioner had received two work orders during the day from Respondent, Indiana Bell, involving conversion of an existing telephone system to touchtone equipment, and installation of an additional telephone line at one location and a new connect at a second location. The Petitioner, believeing he had express as well as implied authority from the Respondent, Indiana Bell, worked past his normal quitting time of 5:00 P.M. in order to finish the two job orders.

The Petitioner applied for disability benefits as a result of his injuries sustained in the accident and for overtime wages covering the time period beyond his normal quitting time of 5:00 P.M. The Respondent, Indiana Bell, classified the injuries as having occurred off-the-job rather than on-the-job and placed the Petitioner on its "sickness medical disability" benefits program instead of its "Accident Benefits" program. The distinction between the two programs being that under the former Petitioner was only allowed to be compensated for a maximum of a year and was terminated from his employment automatically upon his inability to resume his former duties because of his disability.[1] Whereas, under the latter program when it is determined that an employee's injuries are "work-related" the employee is eligible to receive disability

[1]Petitioner was permanently restricted by his physician from climbing telephone poles, a part of his regular employment duties.

benefits until retirement or until he is able to return to work at his regular employment. The Respondent, Indiana Bell, also denied Petitioner's request for overtime wages, terming his extra hours of April 20, 1979, as "unauthorized overtime" and thus not compensable.

The Petitioner, a member of the Respondent, Communications Workers of America, Local 5703 (hereafter Union) filed through that Union two grievances protesting his placement on the sickness Medical Disability Plan and the denial of overtime compensation. (Appendix D, pp. 33, 34.) These grievances were filed August 22, 1979. The Union pursued these grievances through the normal grievance procedure pursuant to Article 7 of the Collective Bargaining Agreement between Indiana Bell Telephone Co., Inc. and Communications Workers of America. Unsuccessful in overturning the Respondent, Indiana Bell's determinations the Respondent, Union requested arbitration of the denial of overtime compensation. The Union did not recommend the issue of improper disability payments for arbitration deciding that it was specifically excluded from arbitration by the Collective Bargaining Agreement.

While still on the employment rolls of Respondent, Indiana Bell, and collecting disability benefits, Petitioner requested that the Respondent, Indiana Bell, assign him to "lighter duty" employment due to his permanent inability to perform the necessary duties of his former job. The Respondent, Indiana Bell, refused to comply with this request even though Petitioner contended that this avenue had been pursued

successfully in the past by other injured employees of Respondent, Indiana Bell. The Union gave no assistance to the Petitioner in his attempts to procure "lighter duty" employment.

After having collected the maximum allowable benefits under the "Sickness Disability" plan the Petitioner was discharged by the Respondent, Indiana Bell, on April 27, 1980. The Union did not grieve Petitioner's discharge opting instead to pursue the overtime compensation grievance. The Union reasoned a resolution of that grievance in Petitioner's favor would lead to a re-classification of Petitioner's accident and injuries to on-the-job and this reinstatement of employment and entitlement to placement on the Accident Disability plan.

The Petitioner was granted an arbitration hearing which was held on January 13, 1981 approximately nine months after his termination. The impartial arbitrator presiding over that hearing found the issue before him to be:

> Whether the employer's action in disallowing payment constitutes a violation of the pertinent contract sections because grievant Ernst was either impliedly authorized by past practice and past supervisors or was actually authorized on the evening in question, April 20, 1979, or whether Ernst's actions that evening were unauthorized so that no overtime work was performed or compensable under the terms of this agreement.

On May 31, 1981, the impartial arbitrator found that the time that the Petitioner was working after

5:30 P.M. on April 20, 1979, was unauthorized overtime and not compensable and denied the grievance in its entirety. No appeal of this award was taken by either the Petitioner or the Respondent, Union.

On April 9, 1982, the Petitioner filed in the United States District Court for the Southern District of Indiana, New Albany Division (hereinafter District Court) a cause of action against the Respondents alleging wrongful discharge by the Respondent, Indiana Bell; breach of its statutory duty of fair representation by the Respondent, Union, and discrimination against the Petitioner on the basis of his disability against both Respondents. Petitioner invoked the jurisdiction of the District Court based upon alleged violations of Section 301 of the Labor Management Relations Act, 29 U.S.C. §185(a) (1947) and of Section 503(a) of the Rehabilitation Act, 29 U.S.C. §793(a) (1978).

On November 5, 1982, after having discovery by means of Interrogatories and Deposition of Petitioner, Respondent, Indiana Bell filed a consolidated Motion to Dismiss for Failure to State a Claim and for Summary Judgment. On November 18, 1982, the Respondent, Union, also filed a Motion for Summary Judgment. Thereafter on December 29, 1982, the District Court issued its Findings of Fact, Conclusions of Law and Judgment granting Summary Judgment to both Respondents and entered them into the record on December 30, 1982. (Appendix C, p. 22.)

In its Judgment the District Court found specifically that there were (a) no genuine issues of fact as

to Petitioner's allegations that he was wrongfully discharged by the Respondent, Indiana Bell, nor that he was unfairly represented by the Respondent, Union; (2) that, in any event that Petitioner's claim was barred by the statute of limitations, applying Indiana's 90-day limitation on actions to vacate arbitration awards, Indiana Code 34-4-2-13; and (3) that Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. 793 does not expressly provide for a private right of action, nor could one be implied. (Appendix C, p. 22.)

Accordingly, Petitioner appealed the District Court's Judgment against him to the United States Court of Appeals. After submission of briefs by all parties and the hearing of oral arguments the Seventh Circuit rendered its decision by published opinion on July 28, 1983. (Yet to be published) (Appendix A, p. 17). The Seventh Circuit affirmed the District Court's judgment dismissing Petitioner's Complaint by holding that (a) there were no genuine issues of fact thus the District Court's grant of Summary Judgment was proper, (2) that the Seventh Circuit's prior holding in *Simpson* v. *Reynolds Metals Co.*, 629 F. 2d 1226, that there is no private right of action under Section 503(a) of the Rehabilitation Act, 29 U.S.C. §793(a) (1978), thus dismissal of that portion of Petitioner's Complaint was proper, and (3) that the United States Supreme Court's decision rendered in *DelCostello* v. *International Brotherhood of Teamsters,* 51 U.S.L.W. 4693 (1983) was controlling and thus dismissal was proper. The Supreme Court in *DelCostello* held that six-month statute of limitations provided in

Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) (1947) applied to similar circumstances as were presented in Petitioner's case.

It is from this decision that the Petitioner petitions this Court for a Writ of Certiorari. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

REASONS FOR GRANTING THE WRIT

I. The Holding of the United States Supreme Court in *Delcostello* v. *International Brotherhood of Teamsters*, 51 U.S.L.W. 4693 (1983), Should Not Be Applied Retroactively to Defeat Petitioner's Claim.

In its recent decision of *DelCostello* v. *International Brotherhood of Teamsters*, No. 81-2386, 51 U.S.L.W. 4693 (1983), this Honorable Court held Section 10(b) of the National Labor Relations Act establishing a six-month limitations period was applicable to an employee suit against an employer and a union for breach of a collective-bargaining agreement and breach of a union's duty of fair representation. The Court of Appeals for the Seventh Circuit relied upon this June, 1983, to support i' affirmance of the District Court's dismissal of Petitioner's Complaint. Although Petitioner concedes that his cause of action is similar to that in *DelCostello*, he contends that the principle announced therein should not be applied to defeat his action instituted in April of 1982 based upon events which occurred in April of 1980. In *DelCostello*, 524 F. Supp. 721 (1981), the United States District Court for the District of Maryland enumerated the factors which are to be considered in deciding whether to apply a decision nonretroactively.

> . . . First, the decision sought to be applied only prospectively must establish a new legal principle, either by overruling "clear past precedent" or by deciding a case of first impression, resolution of which "was not clearly foreshadowed" in earlier cases. *Id.* 404 U. S. at 106, 92 S. Ct. at 355. The prior history, purpose and effect of the rule are to be weighed, to determine whether retroactive application furthers or retards its operation. *Id.* at 106-07, 92 S. Ct. at 355. Finally, retroactive operation must be weighed to see whether substantial injustice or hardship is caused. *Id.* at 107, 92 S. Ct. at 355.

At the time that the Petitioner instituted his cause of action, the controlling decision regarding the statute of limitations was *Autoworkers* v. *Hoosier Corp.,* 383 U. S. 696 (1966), which held that Indiana's state six-year statute of limitations statute for suits upon contracts should be applied to a suit against an employer for violation of a collective bargaining agreement. In reliance upon this past precedent, the Petitioner commenced this action. In light of this, this Court's action in applying a six-month limitation period in *DelCostello* was a clear departure from its holding in *Autoworkers* v. *Hoosier,* and its application to Petitioner's cause of action would work a severe hardship upon and cause a substantial injustice upon the Petitioner. Due to the complete failure of action on his behalf by the Union and the unforeseen opinions of future courts, the Petitioner has been left without a remedy under the law. Petitioner submits that this Court should hold *DelCostello* only prospectively applicable and that he

should be permitted to continue with his valid and meritorious claim against the Respondents.

II. Petitioner Has an Implied Right to Bring a Private Right of Action Under 29 U.S.C. §793(a), The Rehabilitation Act.

Petitioner commenced his action against the Respondent, Indiana Bell, claiming that its action in terminating his employment without any consideration toward placing him in a more suitable job in light of his physical handicap was a violation of the Rehabilitation Act, 29 U.S.C. §793(a), Section 503(a). The Respondent, Indiana Bell, admittedly falls within the provisions of that Act. The Petitioner admittedly is one of the class for whose benefit the statute was enacted. The question for this Court then becomes whether there is any indication that the legislature through implication intended to create a private remedy which would be consistent with the underlying purposes of the legislative scheme. *Cort* v. *Ash,* 422 U. S. 66 (1975) and *Chevron Oil Co.* v. *Huron,* 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 296 (1971). This question was answered in the negative by the Seventh Circuit Court of Appeals in *Simpson* v. *Reynolds Metals Co.,* 629 F. 2d 1226 (7th Cir. 1980), relied upon by both Courts below in dismissing Petitioner's cause of action. The Petitioner contends that this is an incorrect application of the test for an implied remedy announced in *Cort* v. *Ash, supra* at p. 78.

> In determining whether a private remedy is implicit in a statute not expressly providing one,

> several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted, . . . —that is does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

29 U.S.C. §793(a) creates a federal right in favor of Ernst:

> 29 U.S.C. 793(a) *Amount of contracts or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations.* Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services . . . for the United States shall take affirmative action *to employ and advance in employment qualified handicapped individuals* as defined in section 7(7) [29 USCS §706(7)]. (Emphasis added)

29 U.S.C. §706(7)(B) refers to any handicap other than alcoholism or drug abuse. The case of *Simpson* v. *Reynolds Metals Company, Inc.*, 629 F. 2d 1226 (7th Cir. 1980), cited by the Court below in support of its summary judgment involved alcoholism and should not be applied to a handicap such as involved in this case. Ernst's disabilities would qualify Ernst with a handicap included in 29 U.S.C. §706(7)(B).

Ernst's physicians have restricted his employment capabilities by recommending that Ernst not perform

any work involving pole climbing, ladder climbing or prolonged sitting or squatting. He has been permanently restricted from climbing telephone poles, part of the regular duties of his former employment. Ernst is handicapped in regard to ever assuming his former employment duties.

The Congress implied in its language that Department of Labor administrative remedies are optional, as is demonstrated by the following language of 29 U.S.C. §793(b).

> . . . . . , such individual may *file* a complaint with the Department of Labor (emphasis added)

Use of the word "may" is an indication that the legislature did not intend for Department of Labor administrative remedies to be exclusive.

A private remedy is consistent with the underlying purpose of federal legislation in regards to handicapped individuals.

> . . . it is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action.

Lloyd v. *Regional Transp. Authority,* 548 F. 2d 1277 (7th Cir. 1977).

In *Yakin* v. *University of Illinois, Etc.,* 508 F. Supp. 848 (N.D. Ill. 1981), the Court in a Title VI Civil Rights Act of 1964 action wrote:

> Where it is clear that federal law has granted a class of persons certain rights, it is not necessary

> to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling.

29 U.S.C. §793 contains no indication to deny a private cause of action. Additionally, the use of the word "may" (29 U.S.C. §793(b)) evidences legislative intent that a private cause of action can in fact exist under this section.

III. Petitioner Presented Sufficient Facts to Raise a Genuine Issue of Fact; Thus, Summary Judgment Was Improper.

Petitioner was entitled to maintain his actions against the Respondent upon a showing that "the underlying grievance was meritorious and that the Union breached its duty of fair representation." *Miller* v. *Gateway Transp. Co., Inc.*, 616 F. 2d 272 (7th Cir. 1980). Petitioner's claims against the Respondent, Indiana Bell, were for wrongful discharge and for discrimination based upon his handicap. Petitioner's claim against the Respondent, Union, was for unfair representation based upon the Union's failure to process his grievance for wrongful discharge against the Respondent, Indiana Bell. The Respondents and the Courts below have consistently and inexplicably linked Petitioner's action to the denial of overtime payment for the night of April 20, 1979. By narrowly defining and confining the issue, the courts below have erroneously reviewed the wrong facts. Those courts should instead have focused their attention upon the facts presented by the Petitioner which indicated that the

Respondent, Indiana Bell, had refused to assign the Petitioner to "lighter duty" employment even though that had been its prior practice with similarly situated employees; that the Petitioner was granted and now paid Workers' Compensation benefits upon the Industrial Board's finding that his injuries were indeed work-related, a decision which was upheld by the Indiana State Court of Appeals; and that the Respondent, Union, failed to negotiate with the Respondent, Indiana Bell, on behalf of Petitioner and his request for appropriate employment considering his disability; and the Union's failure to formally abritrate Petitioner's claim of wrongful discharge.

The Petitioner contends that this set of facts was sufficient to raise a genuine issue as to whether he was wrongfully discharged and discriminated against by the Respondent, Indiana Bell, and further that based upon these facts a jury could determine that his treatment by the Union was deliberate, capricious, arbitrary or in bad faith and thus a breach of its duty to fairly represent its long-standing member, Petitioner. Instead of pursuing the larger grievance of wrongful discharge in April of 1980, the Respondent, Union, chose to process a claim for seven hours of overtime payment. This most certainly could be labeled arbitrary and capricious. When issues of fact exist regarding the substance of a claim, summary judgment is inappropriate. *Miller, supra,* 616 F. 2d at 277.

CONCLUSION

Based upon the foregoing facts and argument, the Petitioner requests this Court to grant his petition for a Writ of Certiorari to the United States Court of Appeals, Seventh Circuit, reversing the dismissal of his causes of action against both Respondents.

Respectfully submitted,

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APPENDIX

EXHIBIT A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 83-1192

CLIFFORD B. ERNST, JR., - - *Plaintiff-Appellant,*

v.

INDIANA BELL TELEPHONE COMPANY, INC., and
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 5703, - - - - *Defendants-Appellees.*

Appeal from the United States District Court
for the Southern District of Indiana
New Albany Division
No. 82 C 82—Cale J. Holder, Judge

ARGUED JUNE 9, 1983—DECIDED JULY 28, 1983*

Before CUMMINGS, *Chief Judge,* BAUER, *Circuit Judge,* and FAIRCHILD, *Senior Circuit Judge.*

PER CURIAM. We affirm the district court's judgment dismissing the plaintiff's complaint, which alleges violations of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1947), and of Section 503(a) of the Rehabilitation Act, 29 U.S.C. § 793(a) (1978).

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*This appeal originally was decided by an unpublished order on July 28, 1983, pursuant to Circuit Rule 35. The Court has decided to issue the decision as an opinion.

I

On April 20, 1979, Plaintiff Ernst worked installing telephone equipment beyond his 5:00 p.m. scheduled quitting time. While returning from the jobsite after midnight, Ernst was involved in a motor vehicle accident and seriously injured his right ankle and foot. Defendant Indiana Bell Telephone Company characterized Ernst's injuries as "off-the-job." As a result, Ernst was not paid for the overtime he worked that night and was placed on a medical disability benefit program under which he was eligible for payments for one year. Because he had not recovered sufficiently by the end of that year to return to work, Ernst was dismissed from employment in April 1980. If Ernst's injuries had been classified as "work-related," then he would have continued as an employee and remained indefinitely eligible for disability benefits.

In August 1979, Defendant Communications Workers of America, Local 5703 (CWA) filed two grievances regarding the Company's post-accident treatment of Ernst. One grievance protested denial of overtime pay, the other protested Ernst's placement on the "off-the-job" benefit program. CWA representatives pursued both grievances through two stages with Company representatives. CWA then recommended that the overtime pay grievance be submitted to arbitration.

After the decision was made to arbitrate, but before the hearing, Ernst was dismissed from employment. The CWA attorney representing Ernst decided against filing a grievance regarding that termination, instead relying on the overtime pay grievance to settle all issues. Ernst did not request a termination grievance.

In January 1981, the arbitrator heard the overtime grievance. On May 13, 1981, the arbitrator ruled in favor

of the Company and dismissed the grievance in its entirety.*

This suit was commenced on April 9, 1982. Ernst alleges that the Company wrongfully discharged him and that CWA breached its duty of fair representation in handling his grievances. Ernst also alleges that his termination violated the Rehabilitation Act.

II

Ernst does not seriously press upon us, and we cannot find, any genuine issue of material fact requiring a trial in this case. Ernst's evidence does not conflict materially with the defendants' evidence. The closest Ernst comes to establishing a triable factual issue is his allegation that "[t]here is conflicting information concerning Ernst's treatment by the Union concerning negotiating with Indiana Bell for an appropriate job after Ernst's disabling injury and [the Union's] refusal to formally arbitrate his termination of employment." (Appellant's br. at 11.) The district court ruled that the record revealed only that the Union acted diligently and properly at every turn. (R. 21(6).) Our examination of the record leads us to the same conclusion. There is no hint anywhere in this case that the Union's behavior approaches a breach of its duty to fairly represent its member. *See Superczynski* v. *P.T.O. Services, Inc.*, 706 F. 2d 200, 202-203 (7th Cir., 1983).

III

Ernst does not have a private right of action under Section 503(a) of the Rehabilitation Act, 29 U.S.C. § 793(a)

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*In January 1981, Ernest applied for workers' compensation. On July 19, 1982, the Industrial Board of Indiana ruled that Ernst's injuries were work-related and awarded compensation.

(1978). *Simpson* v. *Reynolds Metals Co.*, 629 F. 2d 1226, 1237-38 (7th Cir. 1980). Thus, the district court's dismissal of that portion of Ernst's complaint was proper.

IV

Ernst argues that the district court incorrectly applied Indiana's ninety-day statute of limitations, mischaracterizing the suit as a request to overrule the arbitrator. Ind. Code § 34-4-2-13 (1969). Ernst contends that the court instead should have applied the contract limitations period. Ind. Code § 34-1-2-2 (1981). This issue has been settled for us by the United States Supreme Court's decision in *DelCostello* v. *International Brotherhood of Teamsters*, 51 U.S.L.W. 4693, 4696-98 (1983). The *DelCostello* Court held that the six-month statute of limitations provided in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1947), applies in the circumstances presented in this case. Because this action was filed eleven months after the end of arbitration and nearly two years after Ernst's dismissal, it is untimely.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

EXHIBIT B

Unpublished Per Curiam Order

Judgment—Oral Argument

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 83-1192

CLIFFORD B. ERNST, JR., - - *Plaintiff-Appellant,*

v.

INDIANA BELL TELEPHONE COMPANY, INC., and
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 5703, - - - - *Defendants-Appellees.*

Appeal from the United States District Court
for the Southern District of Indiana
New Albany Division
No. 82 C 82—Cale J. Holder, Judge

UNPUBLISHED PER CURIAM ORDER—July 28, 1983.

Before HON. WALTER J. CUMMINGS, *Chief Judge,* HON. WILLIAM J. BAUER, *Circuit Judge,* HON. THOMAS E. FAIRCHILD, *Senior Judge.*

This cause was heard on the record from the United States District Court for the Southern District of Indiana, New Albany Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

EXHIBIT C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

No. NA 82-82-C

CLIFFORD B. ERNST, JR., - - - - *Plaintiff,*

v.

INDIANA BELL TELEPHONE COMPANY, INC., and COMMUNICATIONS WORKERS OF AMERICA, LOCAL 5703, - - - - *Defendants.*

FINDINGS OF FACT CONCLUSIONS OF LAW AND JUDGMENT

This matter comes before the Court on the November 15, 1982 consolidated motion of defendant Indiana Bell Telephone Company, Inc. (Bell) to dismiss and for summary judgment on the issues of the April 9, 1982 complaint and Bell's November 15, 1982 amended answer consisting of four defenses thereto. Also before the Court is the November 19, 1982 motion of defendant Communications Workers of America, Local 5703 (CWA) for summary judgment on the issues of the April 9, 1982 complaint and CWA's May 28, 1982 answer consisting of eight defenses thereto. The motions were both fully briefed as of December 20, 1982. The Court, being duly advised in the premises, does now submit its ruling.

Clifford B. Ernest, Jr., is a resident of Floyds Knobs, Indiana. From approximately June of 1965 until April of 1980 he was employed by Bell as an installation/repair technician, with the principal duties of installing and re-

pairing telephones for residences and small businesses. A usual and regular part of his duties involved climbing telephone poles and ladders. At all times relevant he was employed at Bell's Mount Tabor Garage in New Albany, Indiana and was also employed pursuant to a collective bargaining agreement between Bell and CWA.

Bell is a corporation, existing and conducting business under the laws of the State of Indiana, engaged in the manufacture, sale, installation, and servicing of telephone communication systems in interstate commerce. Bell is also a federal contractor.

CWA is a labor organization representing employees in an industry affecting commerce, and at all times relevant was the recognized collective bargaining representative of the bargaining unit of Bell's Comptrollers, Marketing and Operations employees, including the plaintiff.

On April 20, 1979 the plaintiff had an assignment to change some equipment at a church and to install another telephone number and another telephone line in a trailer park. In allegedly completing these assignments, the plaintiff was occupied well past this normal quitting time of approximately five o'clock in the afternoon. At approximately midnight the plaintiff sustained a fracture and dislocation of the right foot and ankle when he was involved in an automobile accident while driving a company owned vehicle. The plaintiff claims that he was returning from finally finishing the assignments at the church and trailer park.

Because the accident occurred outside of normal working hours, authorization from one of the plaintiff's superiors to work overtime was needed in order for the plaintiff to be reimbursed for such overtime work. The plaintiff received no such authorization. The time that the accident occurred and the absence of authorization to be working at that hour were the basis for Bell's classifi-

cation of the injury as sustained "off-the-job" and were also the basis for Bell's refusal to pay overtime to the plaintiff for that particular evening's labors.

The classification of the injury as "off-the-job" resulted in the plaintiff being placed on Bell's "sickness" disability benefit program instead of Bell's "accident" disability benefit program. Under the "sickness" program the plaintiff was entitled to, and received, full pay for thirteen (13) weeks and then one-half pay for thirty nine (39) weeks. At the end of fifty-two (52) weeks an employee is no longer eligible to receive benefits and may be, and the plaintiff was, terminated. Upon termination, an employee may, and the plaintiff did, apply for long-term disability pay from the private insurance carrier which administers the benefit plan and which has discretion to decide who is eligible for benefits. These benefits were denied to the plaintiff.

The "accident" disability benefit program provides the injured party (whose injury is classified as "on-the-job") with full pay for thirteen (13) weeks and then half-pay until retirement, or such time as the employee resumes his or her original duties.

After the accident that is the subject matter of this action, doctor's orders prevented the plaintiff from climbing poles or ladders, or from prolonged sitting or squatting; normal chores involved in the perfermance of the job as an installation/repair technician. The prohibition against pole climbing was made permanent by the doctor and, as a result, at no time was the plaintiff able to return to his original job. The plaintiff did apply for light duty jobs during the period that he was receiving "sickness" benefits, but was never placed in one.

In August of 1979 the plaintiff filed two grievances through CWA: one protesting Bell's refusal to pay him overtime for the date of the accident and one protesting the classification of the accident as "off-the-job." Both griev-

ances were processed by CWA representatives through two levels of meetings with Bell representatives, and the union's staff representative for the state of Indiana met with representatives of the company in a third level of the graivance procedure. No grievance was filed over the ultimate termination.

The staff representative for the state of Indiana recommended that the overtime grievance be taken to arbitration before an impartial arbitrator. Prior to making a decision as to whether a grievance will be submitted to arbitration, the grievance is reviewed by the union's state office, which makes a preliminary decision as to whether to arbitrate the grievance. If the state office determines that arbitration is appropriate, it makes such a recommendation to the district office.. At the district office, professional researchers or attorneys review the case to determine, again, whether it merits arbitration. If the district office makes an affirmative decision, the case is submitted to the union's legal staff at its Washington, D.C. headquarters for review and recommendation. The final decision as to whether to arbitrate is made by the Executive Vice President of the national union. The plaintiff's overtime grievance was approved by the national union for arbitration and the issue of whether the plaintiff was to receive overtime pay for the night of the accident was arbitrated.

After the decision to arbitrate, but before the actual hearing, the plaintiff's "sickness" benefits expired and his application for long-term benefits was denied. The plaintiff was terminated, and did not file a grievance over this termination. The union attorney representing the plaintiff in the arbitration determined that resolution of the overtime issue would resolve the benefits issue since a determination that the overtime was authorized would render the accident "on-the-job" and enable the plaintiff to receive the

"accident" benefits. It was also believed that the arbitration would resolve the issue of the plaintiff's termination. These tactics were discussed with the plaintiff by the attorney handling the case.

Prior to the hearing, the attorney representing the plaintiff met with him, and with other witnesses, at least twice to prepare for the hearing.

On January 13, 1981 the arbitration hearing was convened before Arbitrator Elliott H. Goldstein, selected through the Federal Mediation and Conciliation Service. At the hearing the union attorney appeared, cross-examined company witnesses, presented the plaintiff's witnesses, and filed a brief after receiving a transcript of the hearing.

Shortly after the hearing, but before the decision was rendered, the plaintiff wrote to the union and expressed his satisfaction with the manner in which the grievance was presented. The plaintiff described his representation as "clearly superior . . . well-researched and prepared . . . ," a "100% PLUS effort" (original emphasis), "fantastic," "outstanding and everyone did their best, and I'm grateful."

On January 15, 1981, the plaintiff applied to the Industrial Board of Indiana for workers' compensation.

On May 13, 1981 the arbitrator rendered his decision, finding that the time the plaintiff was working after normal working hours on the night of the accident was unauthorized and not compensable. The grievance was denied in its entirety.

The plaintiff's first hearing before the Industrial Board of Indiana occurred on November 3, 1981, and after a partial award was made the plaintiff applied for a hearing before the full Board on November 17, 1981. On July 19, 1982 the full Board found that the plaintiff's injury was work related and awarded workers' compensation.

This action was commenced with the filing of the complaint on April 9, 1982. The plaintiff claims that he was

wrongfully discharged by Bell and that CWA breached its duty of fair representation in the handling of his grievances. It is alleged that the sole reason for the termination was so that Bell could avoid paying the plaintiff the more costly "accident" benefits for which the plaintiff was entitled due to injuries suffered in an on-the-job accident on April 20, 1979. The plaintiff avers generally that CWA breached its duty of fair representation even though it knew that there was no just cause for the plaintiff's discharge, that he was treated differently than other similarly situated employees, and that the negotiations carried on by the union in his behalf were no more than a sham to delude the plaintiff that a sincere effort was being made in his behalf. Relief from these alleged acts of misconduct is sought under 29 U.S.C. 185, Section 301 of the Labor-Management Relations Act. The plaintiff's termination also was alleged to be in violation of 29 U.S.C. 793, Section 503 of the Rehabilitation Act of 1973, because the termination was due to the disability of the plaintiff which was the result of the April 20, 1979 accident.

Bell at all times relevant was an employer in an industry affecting commerce as defined by 29 U.S.C. sections 142(1), 142(3), 152(2), and 185. Bell is also subject to the provisions for employment and advancement of qualified handicapped persons contained in 29 U.S.C. 793. CWA is a labor organization as defined in 29 U.S.C. 142(1), 142(3), 152(5), and 185. The plaintiff is a resident of Indiana. Accordingly, this Court has jurisdiction over all of the issues and over all of the parties to this action.

An action lies under Section 301 of the Labor-Management Relations Act if an employee shows both that the underlying grievance was meritorious and that the union breached the duty to fairly represent the employee. While a union may not arbitrarily ignore a meritorious grievance or process it perfunctorily, the employee does not have the

unqualified right to have his complaint arbitrated regardless of the provisions of the applicable collective bargaining agreement. A union is free to make the decision that a particular grievance lacks merit to justify arbitration, without the fear of being charged with a breach of its duty of fair representation. *See Vaca* v. *Sipes*, 386 U. S. 171, 191-93, 87 S. Ct. 903, 917-18 (1967). Although the allegations contained in the pleadings are the barest of conclusions, it appears that the plaintiff attacks the union for 1) not entering into evidence at the hearing a certain document, 2) not engaging in a particular line of cross-examination with a particular witness, and 3) treating the plaintiff differently than other similarly situated employees by not getting him assigned to less strenuous positions that allow for the injuries. Assuming that these claims are true, they do not even lead to an entertainable inference that the union's conduct during the presentation of the plaintiff's case was deliberately hostile, irrational, arbitrary, capricious, or in bad faith; this is the standard for a finding that a union breached its duty of fair representation.

Contrary to the bald assertions of the plaintiff, the record of this case evidences no issues of fact in regard to the union's alleged deliberate mistreatment of the plaintiff. Rather, the record only shows the diligent efforts of the union on behalf of the plaintiff. All of the grievances pertinent to this action were pursued to the full extent provided for in the governing collective bargaining agreement, and the union even exercised its discretion in arbitrating the overtime grievance in the belief that a favorable ruling on this matter would result in the plaintiff's becoming eligible for "accident" benefits and being reinstated to some employment with Bell. The plaintiff has not shown, nor alleged, that the union had the power to assign him to some less strenuous assignments that would accommodate his injuries, or that such assignments were even available.

Whether a particular document is offered into evidence or a particular line of questioning of a witness is pursued does not support a finding of breach of the duty of fair representation because, as the plaintiff admits, lack of diligence or even the commission of negligence will not support a finding of arbitrary, capricious conduct. The union has not acted arbitrarily, has use of all procedures as provided for in the collective bargaining agreement in effect at the time, and the final resolution of the plaintiff's grievances, at the third level of the grievance procedure for the complaint about the classification of the plaintiff's injury and at arbitration for the complaint about eligibility for overtime, are binding on the plaintiff according to public policy and the collective bargaining agreement. The plaintiff has no claim against the defendant Communications Workers of America, Local 5703 for breach of its duty to fairly represent him.

Even if the plaintiff made sufficient allegations to support a claim against CWA for breach of the duty to fairly represent, the plaintiff's claims would be barred by the applicable statute of limitations, I.C. 34-4-2-13. Since Congress did not enact a specific statute of limitations for Section 301 actions, the timeliness of such actions is a matter of federal law to be determined by reference to the proper state statute of limitations. When no statute directly applies, one must be applied by analogy. Faced with the need to make a choice between a statute of limitations governing actions to vacate arbitration awards and a statute of limitations governing contracts, as this Court is, both the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit have chosen the former in suits against employees under Setcion 301. *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 101 S. Ct. 1559 (1981); *Davidson* v. *Roadway Express, Inc.*, 650 F. 2d 902 (1981). The record in this action shows that the essence of

the arbitrator's decision was that the plaintiff was not, according to the collective bargaining agreement, working for Bell at the time of the unfortunate accident; the plaintiff was "off-duty." If he had been "on-duty" he would have been eligible for compensation for the hours that he allegedly worked the night of the accident. Because a finding by this Court that the plaintiff was "on-duty" when the accident occurred would necessarily require overruling the arbitration decision, the statute of limitations applicable to actions to vacate arbitration awards, I.C. 34-4-2-13, is applicable. The statute of limitations as provided by that statute is ninety (90) days, and it began to run on May 13, 1981. There is no evidence in the record to justify a finding that either CWA or Bell waived the statute of limitations or that they should be estopped from asserting it; neither is there any reason on the record to support a finding that the statute of limitations should be equitably tolled. As the complaint in this action was not filed until April 9, 1982, the statute of limitations provided by I.C. 34-4-2-13 bars the plaintiff from bringing an action under Section 301 of the Labor-Management Relations Act.

The plaintiff also alleges that his termination from employment with Bell violated 29 U.S.C. 793, Section 503 of the Rehabilitation Act of 1973. Section 503 does not expressly provide a private right of action. The United States Court of Appeals for the Seventh Circuit, in *Simpson* v. *Reynolds Metals Company, Inc.*, 629 F. 2d 1226 (1980), could "find no extrinsic evidence on congressional intent . . . to create a private remedy nor have we discovered any subsequent persuasive indication that it has ever been the intent of Congress to create a private judicial remedy. Neither do we believe that implication is essential to achieving the objectives of the statute." *Id.* at 1244. This Court is bound by the decisions of the United States Court of Appeals for the Seventh Circuit, and ac-

cordingly a finding that there is no private right of action under Section 503 is mandated. Therefore, the claim under that section must be and hereby is dismissed.

There are no genuine issues as to any material facts.

The law is with the defendants and against the plaintiff.

JUDGMENT

It is hereby ADJUDGED that the plaintiff take nothing by virtue of this action and that civil action number NA 82-82-C is DISMISSED WITH PREJUDICE.

It is further ADJUDGED THAT THE COSTS OF THIS ACTION BE ASSESSED AGAINST THE PLAINTIFF.

Dated this 29th day of December, 1982.

Cale J. Holder, Judge

(s) Cale J. Holder
United States District Court
Southern District of Indiana

EXHIBIT D

ERNST

C.W.A. GRIEVANCE REPORT

Step 2

UNION #3

Employee Cliff Ernst Local 5703 Job Classification Plant Installation-Repair Tech.

Location 506 Mt. Tabor, New Albany Presented to Jim Lane Date 8-22-79

Steward Gary Bridgewater

Statement of Grievance Indiana Bell violated the contract, Appendix P-3, Section 3 (Proper pay) the week of my accident. IBT management (Jack Mattix) receive a note from me, while still in my hospital room, that explained my evening' events up to the accident, and in that note I requested a check-out time of 12:30 AM, 4-21-79. I found out about two weeks ago that management checked out at 5:30 PM 4-20-79, which is 7 hours short. (I've not been allowed a c of the timesheet.) I've got 2 pay-stubs for overtime equal to a check-out of approximately 11:15 PM 4-20-79 (!?) I'd like my timesheet corrected, an another check for difference still owed me.

Signed Clifford B. Ernst, Jr.
(Employee)

DISPOSITION BY COMPANY'S REPRESENTATIVE

IF SATISFACTORILY SETTLED, UNION REPRESENTATIVE WILL SIGN HERE

Signed

Title

Date

EXHIBIT D

copy

C.W.A. GRIEVANCE REPORT

Step 2

Employee Cliff Ernst Local 5703 Job Classification Plant Installation Repair Technician

Location 506 Mt. Tabor, New Albany Presented to Jim Lane Date 8-22-79

Steward Gary Bridgewater

(Unfair Treatment)

Statement of Grievance Following my vehicle accident (4-20-79) in Indiana Bell Telephone Co. work van, (in which I received a broken right ankle) I was notified of IBT's decision to classify my accident as Off-the-job "sickness" disability. Dist. Mgr. J. L. Allender sent me a letter dated 7-26-79 (I received it 7-28-79) that explained the company's "reasoning" on their decision. I feel this is wrong, and means improper benefits for me, particularly if my disability goes over a year. IBT is also implying wrong-doing on my part (driving a company vehicle without "permission"). I'm requesting the accident be reclassified to "ON-the -job", with proper benefits, and clearance of any disciplinary actions related to the accident.

Signed Clifford B. Ernst, Jr.
(Employee)

DISPOSITION BY COMPANY'S REPRESENTATIVE

IF SATISFACTORILY SETTLED, UNION REPRESENTATIVE WILL SIGN HERE

Signed

Title

Date

Signed
Union

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